

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1331

To be argued by
PETER NOEL DUHAMEL

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1331

UNITED STATES OF AMERICA,

Appellee,

—v.—

TAHERA WEINSTEIN,

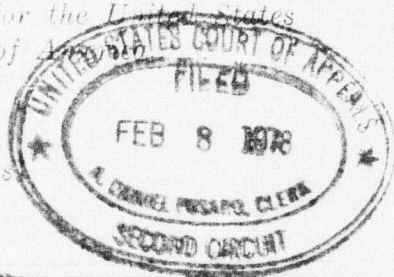
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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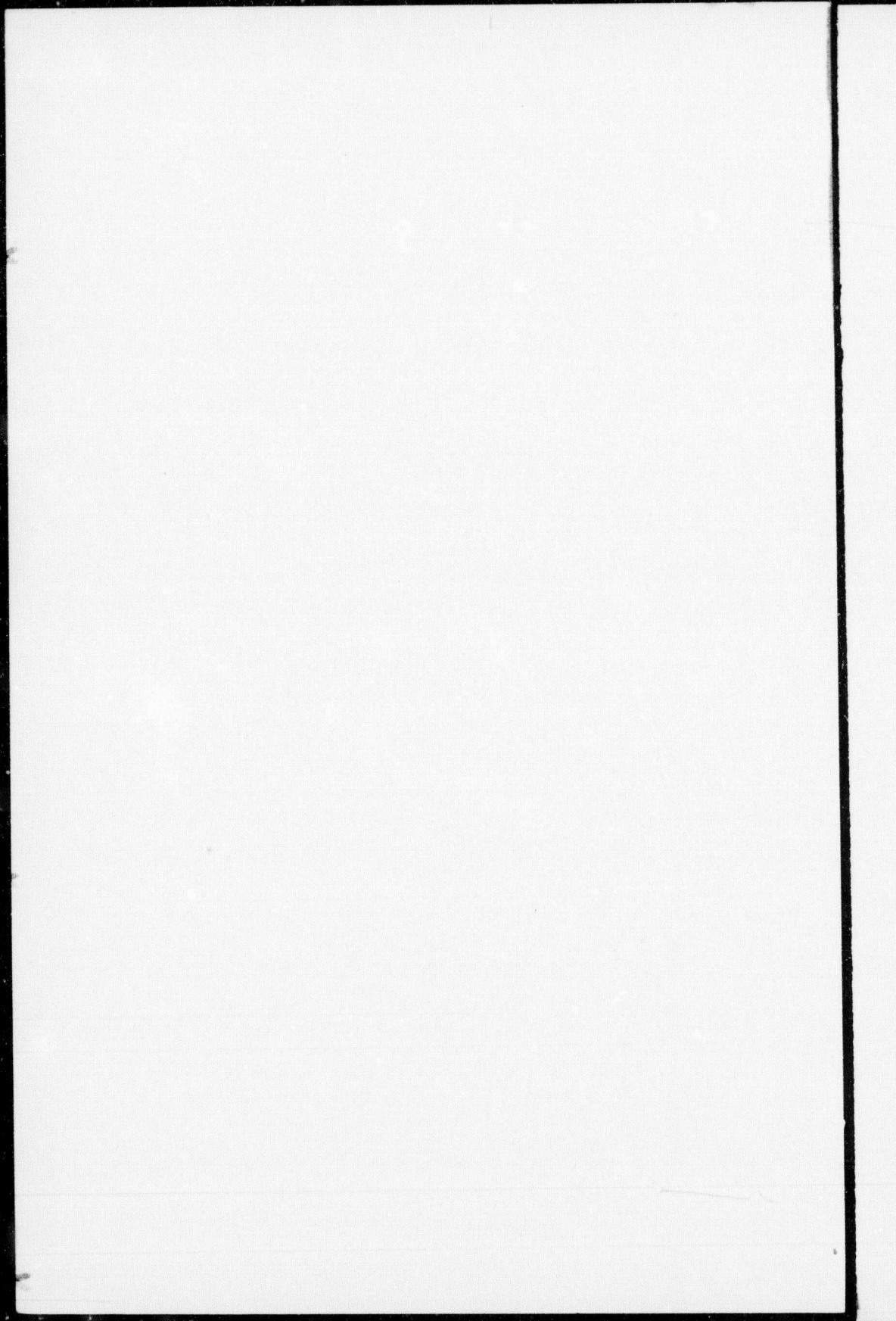


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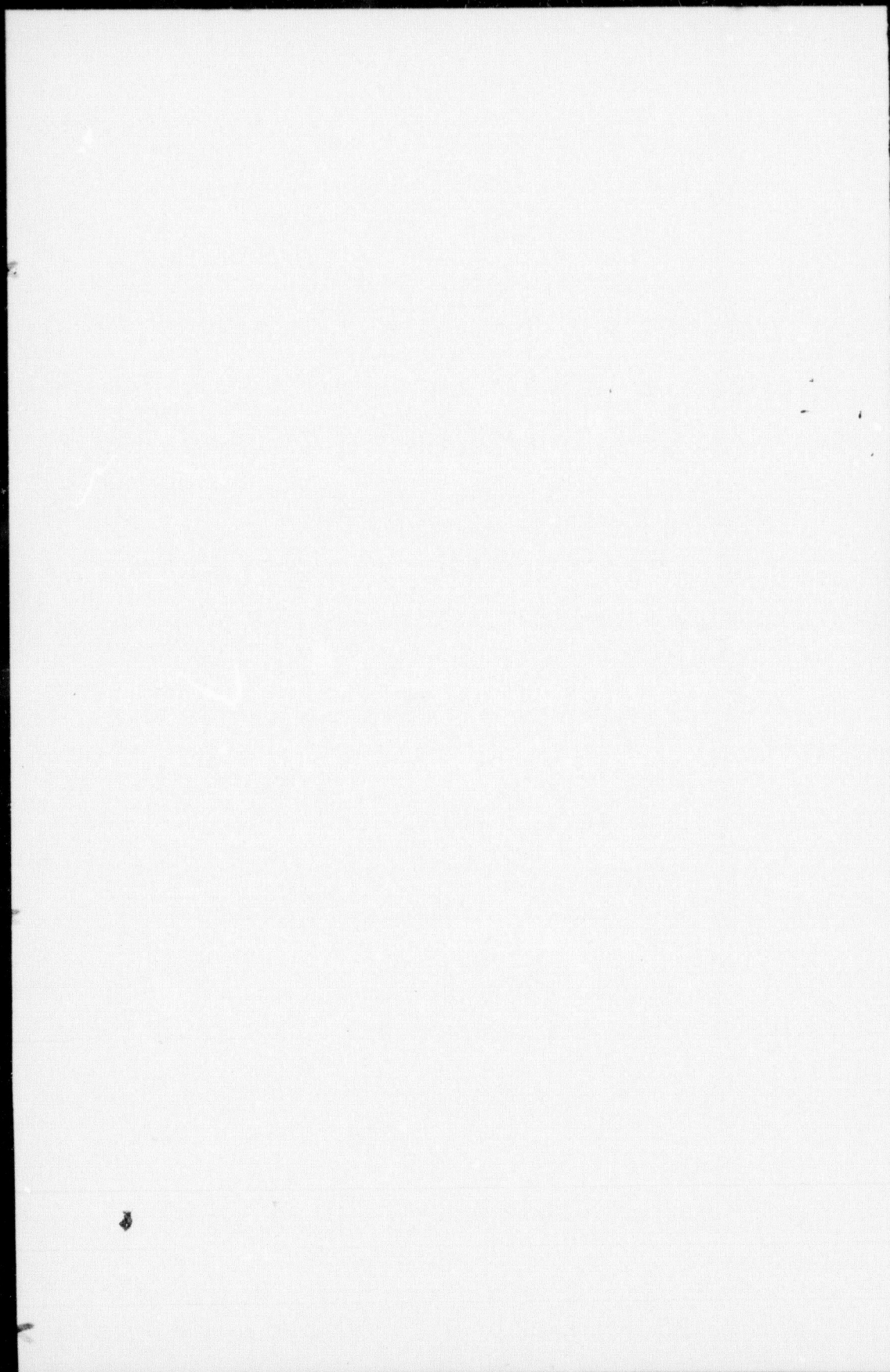
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Docket No. 77-1331

UNITED STATES OF AMERICA,

Appellee,

—v.—

TAHERA WEINSTEIN,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Tahera Weinstein appeals from a judgment of conviction entered on July 25, 1977, in the United States District Court for the Southern District of New York, after a bench trial before the Honorable Charles M. Metzner, United States District Judge.

Indictment 77 Cr. 66 was filed in three counts on January 31, 1977. Count One charged Weinstein with illegally soliciting and receiving \$300 in proceedings relating to naturalization, in violation of Title 18, United States Code, Section 1422. Counts Two and Three each charged Weinstein with soliciting and receiving \$250 in naturalization proceedings, in violation of the same statute.

The trial began and was completed on June 8, 1977. On June 10, 1977, Judge Metzner found the defendant guilty of all three counts as charged.

On July 25, 1977, Judge Metzner sentenced Weinstein to two years probation and a fine of \$2,500 on Count One. Imposition of sentence was suspended on Counts Two and Three.

Statement of Facts

The Government's Case

Yasmin Pirani, a Tanzanian National, entered the United States legally in April of 1974 for an initial visit of three months. (Tr. 13).^{*} In late June of 1974, Ms. Pirani sought an extension of her visit through the Immigration and Naturalization Service (hereinafter "INS"), which subsequently granted her two three-month extensions. (Tr. 14).

In November of 1974, Ms. Pirani lost her Tanzanian passport and other papers regarding her status in this country. (Tr. 14). She reported this loss to INS and was informed that INS could not extend her visit nor deport her until she was given a new passport. Ms. Pirani reapplied for another passport in December of 1974. (Tr. 15).

In January, 1975 Ms. Pirani settled in California for an indefinite period of time. In February Ms. Pirani's new passport was sent to her New York City address. Upon returning from California in late June of 1975, Ms. Pirani picked up her new passport in New York City. (Tr. 16). Although Ms. Pirani preferred to remain in the United States, she believed that a request for additional extensions in the United States would be denied

^{*} "Tr." refers to the trial transcript; "GX" refers to Government exhibit; "H. Tr." refers to the suppression hearing transcript; "Br." refers to appellant's brief on appeal.

because several months had elapsed since her new passport had been issued. (Tr. 17).

In early August, 1975 Ms. Pirani was introduced to the defendant, Tahera Weinstein, through an acquaintance who was the defendant's son. (Tr. 17). While conversing with the defendant, Ms. Pirani informed her that she, Ms. Pirani, would be leaving the United States shortly because her status as a visitor would soon terminate. (Tr. 18). The defendant, a former Pakistani National, then told Ms. Pirani not to be alarmed because she had previously arranged extensions of stay in the United States for other aliens and would do the same for Ms. Pirani. (Tr. 19).

The defendant advised Ms. Pirani that \$300 in cash was needed to begin the process. (Tr. 23). Around September 30, 1975, Ms. Pirani made this payment. Before doing so Ms. Pirani signed in blank various INS forms provided by Weinstein which had to be filled out and filed as the first step in the procedure to obtain a change of status. (Tr. 22). After the forms were signed, Ms. Pirani left the papers with the defendant to complete and to process for her. (Tr. 21). Around mid-November, 1975, Ms. Pirani paid the defendant an additional \$500 in cash in order to complete the transaction. (Tr. 24-25).*

From December, 1975, through at least May, 1976, Ms. Pirani telephoned Weinstein nearly every week to inquire about developments regarding her alien status. (Tr. 22). The defendant gave unfavorable responses and blamed the lack of progress on logistical problems at INS. During these conversations, the defendant provided Ms.

* On August 26, 1976, a Warrant of Deportation was issued against Ms. Pirani, which process was stayed pending completion of the ongoing investigation.

Pirani with a INS file number (which was later found to be non-existent). (Tr. 81).

In May of 1976 Ms. Pirani was questioned by INS investigators concerning another immigration matter and, during this investigation, informed INS of the acts committed by Tahera Weinstein. (Tr. 29). An investigation into Ms. Pirani's allegations ensued. Recordings of telephone conversations between Ms. Pirani and the defendant were made upon Ms. Pirani's consent. (Tr. 29). During the course of those conversations, the defendant discussed receiving the \$800 from Ms. Pirani to pay a contact at INS.

The defendant was subsequently arrested, after which she made self-incriminating statements to representatives of the Government. Specifically, she admitted that she had received \$800 from Ms. Pirani "to help her secure her citizenship papers to remain in the United States," but she gave conflicting statements as to what she did with the money. (Tr. 94).

The Defense Case

The defendant offered no proof on her own behalf.

A R G U M E N T

POINT I

The District Court Properly Denied The Defendant's Motion to Suppress Her Post-Arrest Statements.

The defendant's first point on appeal is that her post-arrest statements were taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966) and that the District Court erred in denying her motion to suppress. In making this argument, the defendant's brief contends that she was not

adequately apprised of her rights and that she made repeated requests to consult her attorney. Although defendant presents the argument to this Court as though the District Court accepted her version of these events, the District Court's brief opinion reflects that it rejected the defense testimony on the issue, choosing instead to credit the FBI agent and the Assistant United States Attorney, whose testimony substantially contradicted that of the defendant and her husband. When the District Court's findings are given proper weight, it becomes clear that Judge Metzner correctly concluded that the defendant knowingly waived her rights before making the post-arrest statements.

A. The Pertinent Testimony

1. Defendant's Suppression Motion Affidavit

Prior to trial, the defendant moved to suppress her post-arrest statements and, in support of the motion, submitted her own affidavit as to how the statements were taken from her. (Affidavit of Tahera Weinstein, sworn to March 10, 1977). In her affidavit, the defendant attested that two FBI agents came to her house on the morning of the arrest, blocked her driveway, entered her home, then informed her that she was under arrest. She swore that she then said that she wanted to call her lawyer, but that the agents told her that she could do so downtown. During the subsequent ride to the United States Attorney's office, although she was not verbally informed of her rights, Weinstein was given a card with "rights" printed on it which she signed, but "which had no meaning to me because I was nervous." The affidavit then asserted that upon arriving at the United States Attorney's Office, the defendant again requested to speak to her attorney, but was told that she "must wait till after I've been questioned." The affidavit further stated that she was taken for fingerprinting and photographing,

after which she repeated her request for an attorney, which was met with the statement that first she would have to talk to the Assistant United States Attorney. The defendant swore that she then spoke to the Assistant United States Attorney, [Frank Wohl], whom she told that she "wished to call a lawyer." According to the defendant, he responded by saying "this was merely an informal proceeding I was undergoing, . . . that they needed my assistance . . ." and that "after I spoke with him I could call any one I liked." The affidavit asserted that the interview with Mr. Wohl lasted for about 1½ hours, after which the defendant "insisted on calling my attorney and was finally permitted to do so." Finally, the defendant attested that she "was never orally informed of [her] constitutional rights during these entire proceedings."

Based on this showing, the District Court granted a suppression hearing.

2. The Hearing Testimony

The Government proceeded first at the hearing, calling one of the arresting agents, FBI Special Agent William H. Lynch, and Frank Wohl, the Assistant United States Attorney who conducted the post-arrest interview.

Special Agent Lynch testified that at 7:30 a.m. on December 7, 1976, he arrested the defendant Tahera Weinstein in her husband's presence at her home in Wheatley Heights, New York. (H. Tr. 4-5). The agent swore that, contrary to the defendant's sworn statement, the defendant made no request for an attorney at that time. (H. Tr. 9). While transporting the defendant to the United States Attorney's Office, Agent Lynch told her that it was his duty to advise her of her rights and that he showed her a "advice of rights" form, which she appeared to read. He asked if she understood her rights;

she acknowledged that she did. He asked if she would sign the form; she said she would and she did. (H. Tr. 6-7; GX 1).^{*} The agent swore that contrary to the defendant's sworn statements, the defendant made no request for an attorney nor was there any discussion about an attorney from the time of her arrest until she was brought into the office of the Assistant United States Attorney who was to conduct the interview. (H. Tr. 7, 11).

^{*} The advice of rights form, GX 1, is a printed form with handwritten notations which reads as follows:

Interrogation; Advice of Rights

Your Rights

Place Wheatley Heights, N.Y.

Date 12/7/76

Time 7:45 A

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed TAHERA WEINSTEIN

Witness: s/ William H Lynch, Jr., FBI/SA, New York,
12/7/76

Witness: s/ James J. Brennan, FBI/SA, New York, N.Y.
12/7/76

Time: 7:52 A

Shortly after arriving at the United States Attorney's Office the defendant was interviewed by Assistant United States Attorney Frank H. Wohl, then a Deputy Chief of the Criminal Division. Mr. Wohl testified that after he introduced himself, the defendant inquired: "[W]ill I be permitted to call an attorney." Mr. Wohl said, "Yes." (H. Tr. 28). Mr. Wohl then read from a form which set forth the *Miranda* warnings, despite the defendant's statement to the effect that "her rights had been shown to her in the car. . . ." (H. Tr. 28-30). As to the right to counsel, Mr. Wohl testified: "I told her, you have a right to consult an attorney and to have that attorney present during the interview, do you understand that?" The defendant said, "Yes." (H. Tr. 29).

Mr. Wohl then offered the defendant an opportunity to cooperate with the Government, telling her that she would nevertheless be prosecuted but that the extent of her cooperation would be made known to the sentencing judge. (H. Tr. 31). After urging her to cooperate, Mr. Wohl asked the defendant what she wanted to do. The defendant said that "she would cooperate fully . . ." (H. Tr. 32).

Subsequently, about an hour after the interview started, some attorneys called Mr. Wohl and were allowed to talk with the defendant. (H.Tr. 34). The defendant then asked to call another attorney, which she did, but he was not in so she left a message for him to call her back at Mr. Wohl's office. (H.Tr. 34). Several minutes later the attorney returned her call. After a couple of minutes the defendant asked Mr. Wohl to talk with her attorney, who asked Mr. Wohl to wait until he arrived to take the defendant to a bail hearing. (H.Tr. 35). Mr. Wohl did so. (H.Tr. 36). Mr. Wohl, who at this point was taking background information, completed doing so and terminated the interview.

The defendant's husband and the defendant then testified, reaffirming the story presented in the defendant's affidavit and substantially contradicting the Government's evidence. The defendant's husband, Robert Weinstein, testified that upon her arrest at her home, the defendant started to go to the kitchen to call her attorney but that one of the agents told her she would call her attorney after they took her downtown to ask her some questions. (H.Tr. 51). Mr. Weinstein also swore that he witnessed two other occasions while he waited in the reception area of the United States Attorney's office when his wife first asked and later demanded to talk to an attorney and the agents refused her request. (H.Tr. 52, 53). Finally, Mr. Weinstein swore that although he had observed from the early morning onward that the agents repeatedly refused to honor his wife's requests to call an attorney, he himself did not call an attorney for his wife until between 1:00 and 2:00 p.m. (H.Tr. 56).

The defendant testified, as she had attested in her affidavit, that she requested to call her attorney in her home upon her arrest, twice before meeting the Assistant United States Attorney, and that she was repeatedly told that first she must be questioned. (H.Tr. 62, 64, 66, 74). Again, as in her affidavit, the defendant attempted to establish that she had never comprehended her rights, swearing that she had signed the advice of rights form only after hurriedly glancing at it. (H.Tr. 64). On cross-examination, the defendant admitted that she is an accountant and that she frequently deals with papers and documents. (H.Tr. 75).

B. The District Court's Opinion

In a short endorsement order filed on April 4, 1977, Judge Metzner denied the defendant's motion to suppress. Rejecting the defendant's sworn statements that she only received her rights once and had not understood them, Judge Metzner found that there was "no doubt that the

defendant had been given *Miranda* warnings on two different occasions and that she clearly understood their import." Similarly rejecting the defense testimony that the defendant had repeatedly requested an attorney, the District Judge found that the defendant merely "indicated a desire to call her attorney" but had "continued to answer questions after listening to the tape of a telephone conversation in which she was one of the participants."

C. The Applicable Law

In the first point of her brief, the defendant makes a diffuse argument that attempts to challenge the admissibility of her post-arrest statements on several grounds. (Br. 5-13). At the outset, she complains that she was only advised of the basis for her arrest by reference to the section number of the statute which she was alleged to have violated. (Br. 5). Of course, even if this provided an insufficient explanation to the defendant of the basis of her arrest, it would create no legal basis for suppression of the defendant's subsequent statements. However, in any event, before the defendant made any statement that was used against her, she certainly learned the reason for her arrest, because some of the evidence against her was presented to her. (H.Tr. 31).

Next, defendant complains that the agent who gave her written warnings failed to advise her orally of her rights and that the officer merely presumed she understood them. (Br. 5). Apart from the fact that the defendant was later readvised of her rights orally by Assistant United States Attorney Wohl, there is no legal requirement that *Miranda* warnings be given orally. The agent's testimony that he gave the defendant the form, she appeared to read it and acknowledged that she understood it more than supported the District Court's finding that the defendant received and understood her rights.

The defendant next argues that the Government violated *Miranda* when the Assistant United States Attorney responded to the defendant's question, "Will I be permitted to call an attorney?" by giving *Miranda* warnings. The premise of the defendant's argument is that, after the defendant's inquiry, the Government was not even entitled to ascertain whether the defendant was willing, knowingly and intelligently, to waive her *Miranda* rights. The law does not support the defendant's argument.

The requirements of *Miranda* were recently explicated by the United States Supreme Court in *Michigan v. Mosley*, 423 U.S. 96, 106 n.10 (1975), where the Court stated that *Miranda*

"distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that 'the interrogation must cease until an attorney is present' only '[i]f the individual states that he wants an attorney.'" Quoting *Miranda v. Arizona*, 384 U.S. 436 at 474.

Although dealing with a defendant's asserting his right to remain silent, rather than his right to counsel, *Michigan v. Mosley*, *supra*, made clear that a defendant's assertion of his rights would not necessarily preclude all further questioning. Following *Michigan v. Mosley*, *supra*, the Ninth Circuit recently concluded, in a case more difficult than this one, that when a defendant is fully warned of his *Miranda* rights, no Fifth Amendment violation occurs if he requests an attorney but then changes his mind and gives a statement. *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976), *cert. denied*, — U.S. — (1977). Accord *United States v. Davis*, 527 F.2d 1110 (9th Cir. 1975), *cert. denied*, 425 U.S. 953 (1976); *United States v. Hodge*, 487 F.2d 945 (5th Cir. 1973). Similarly, in *United States v. Marchildon*, 519 F.2d 337 (8th Cir. 1975), although the defendant expressed an intention to

employ an attorney, the Eighth Circuit found that interrogation was not then prohibited as long as that defendant knowingly elected to answer questions in the absence of the attorney. That Circuit likewise stated in *United States v. Scogin*, 459 F.2d 182 (8th Cir.), *cert. denied*, 409 U.S. 865 (1972), that there was no violation of *Miranda* where a fully warned defendant submitted to an interview after he unsuccessfully attempted to reach his attorney. See also *United States v. Kaylor*, 491 F.2d 1127 (2d Cir. 1973), *remanded on other grounds*, 491 F.2d 1133 (2d Cir. *en banc*), *judgment vacated on other grounds sub nom. United States v. Hopkins*, 418 U.S. 909 (1974) (defendant made statements "after *Miranda* warnings but in the absence of the attorney requested" by him; held, no violation of *Miranda*); *Biddy v. Diamond*, 516 F.2d 118 (5th Cir. 1975), *cert. denied*, 425 U.S. 950 (1976).*

In this case, the defendant's inquiry about calling an attorney came before the Assistant had had an opportu-

* Of course, violations of *Miranda* have been found where a defendant was warned of his rights and responded to the warning by requesting an attorney, but the interrogation nevertheless proceeded. *United States v. Johnson*, 558 F.2d 1225 (5th Cir. 1977); *United States v. Massey*, 550 F.2d 300 (5th Cir. 1977); *United States v. Kinsman*, 540 F.2d 1017 (9th Cir. 1976); *United States v. Womack*, 542 F.2d 1047 (9th Cir. 1976); *United States v. Blair*, 470 F.2d 331 (5th Cir. 1972, *cert. denied*, 411 U.S. 908 (1973)). Each of those cases stands for the proposition that if a defendant does not choose to waive his rights after receiving *Miranda* warnings and questioning continues, *Miranda* is violated. However, this case is distinguished from those by virtue of the fact that here the defendant's inquiry about an attorney immediately preceded the giving of full warnings. The defendant's failure to respond to those warnings by invoking any of her rights represented a knowing waiver that fully satisfied *Miranda*. See, e.g., *United States v. James*, 528 F.2d 999, 1019 (5th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3570, (1977). ("All that the prosecution must show is that the defendant was effectively advised of his rights and that he then intelligently and understandingly declined to exercise them"); *United States v. Ganter*, 436 F.2d 364, 370 (7th Cir. 1970).

nity to give her the full *Miranda* warnings. Certainly, the Assistant was following, not violating, the strictures of *Miranda* by proceeding to give the defendant her rights and permitting her to determine knowingly and intelligently whether she wished to invoke or to waive them. Fully knowing her rights, having heard some of the evidence against her, and having heard the Assistant urge her to cooperate,* the defendant decided to offer her cooperation. In these circumstances, the requirements of *Miranda* were fully met, as the District Court correctly concluded.

Finally, even *assuming arguendo* that the defendant's post-arrest statements should have been suppressed, this claim cannot serve to overturn the defendant's conviction

* In her brief the defendant suggests that it was improper for the Assistant United States Attorney to urge her to help herself by cooperating with the Government. (Tr. 31). On the contrary, it is entirely permissible for agents of the Government to urge a defendant to cooperate, and even to suggest that he may be treated more leniently if he does. *United States v. Reynolds*, 532 F.2d 1150, 1156-60 (7th Cir. 1976); *United States v. Williams*, 479 F.2d 1138 (4th Cir.), *cert. denied*, 414 U.S. 1025 (1973); *United States v. Glasgow*, 451 F.2d 557, 558 (9th Cir. 1971); *United States v. Frazier*, 434 F.2d 994 (5th Cir. 1970). This Court has held that it is proper for agents to apprise a defendant of the benefits of cooperation and to evaluate the options before her:

"Having fairly and fully advised Pomares of his constitutional rights, as required by *Miranda*, the agents were free to discuss with Pomares the reasons why he should cooperate. It was quite proper in the course of such discussion to mention the situation which Pomares faced and the advantages to him if he assisted the Government. The agents stated facts; they made no misrepresentations. Nothing the agents were shown to have said or done was unfair or overreaching." *United States v. Pomares* 409 F.2d 1220, 1222 (2d Cir.), *cert. denied*, 419 U.S. 1032 (1974).

See also *United States v. Ferrara*, 377 F.2d 16, 17 (2d Cir.), *cert. denied*, 389 U.S. 908 (1967).

since the admission of this evidence could be no more than harmless error. *Chapman v. California*, 386 U.S. 18 (1967); *United States v. Berenguer*, 562 F.2d 206 (2d Cir. 1977). This was a case, as the Assistant United States Attorney testified in the suppression hearing, where the Government had overwhelming evidence prior to the defendant's arrest and where the post-arrest interview was conducted primarily to pursue a further investigation. (H.Tr. 30, 38-39, 43). The evidence which was gathered before the defendant's arrest provided ample proof beyond a reasonable doubt.

Specifically, the Government's proof, without the post-arrest statements, consisted not only of the testimony of Yasmin Pirani, buttressed by corroborating documents,* but also of tape recorded conversations in which the defendant made damaging admissions which fully corroborated Pirani's testimony. In a telephone conversation recorded on October 30, 1976, the defendant stated that she was going to ask her female contact at INS about Pirani's papers. (GX 5; Tr. 32). The defendant also stated that she had given the \$800 she had received from Pirani to her contact, who had recently been promoted. The defendant said that she would get the \$800 back if her contact did not want to do anything on Pirani's behalf. In a recorded call on November 13, 1976, the defendant stated that her contact had become a "director" at INS and that, consequently, it would be much easier for her to assist Pirani. (GX 6; Tr. 35). The defendant indicated that perhaps she could arrange a meeting between Pirani and her contact. On November 20, 1976, the defendant promised that her contact would do the job that week. (GX 7; Tr. 39). The defendant acknowledged

* Pirani was able to produce a savings passbook reflecting withdrawals of moneys which she used to pay the defendant, as well as a check given to her (but later stopped) by the defendant as partial repayment. (GX 3, 4).

that her contact had had the money for a year and that if she wanted more money she would ask for it. During a subsequent telephone call on December 5th the defendant advised that Pirani's file at INS revealed that someone had reported her as an undesirable alien. The defendant also stated that her contact was going to Washington just to handle this matter. In response to a threat by Pirani to make a statement to the authorities the defendant said: "... nobody would believe you anyway. You'd only make ... trouble for yourself." The defendant also stated that the money was paid "to make the contact interested in your case."

Against this overwhelming evidence, the defendant's post-arrest statements can be fairly viewed as no more than cumulative evidence. The portions of the statements offered at trial merely served to repeat the defendant's admission that she had received \$800 in cash from Pirani in exchange for her promise to obtain citizenship papers for Pirani. The only material added by the statements was the defendant's claims about who ultimately received Pirani's money.*

In sum, even if the post-arrest statements had been excluded, the verdict would not have been different. Accordingly, the constitutional claims raised about the defendant's statements could be no more than harmless

* The sum total of evidence received at trial from the post-arrest statements of the defendant consisted of one paragraph of testimony of Special Agent Mullaney, as follows:

"Mrs. Weinstein advised that she had received \$800 in cash from a Yasmin Pirani and in return for this \$800 she was to help her secure her citizenship papers to remain in the United States. She stated that the \$800 was given to an attorney. Advised first the attorney's name was one Aaron Goldsmith. She later advised she gave the \$800 to a Rebecca Goldsmith, and she later advised that she gave the \$800 to a messenger service." (Tr. 94).

error beyond a reasonable doubt. *Chapman v. California, supra.*

POINT II

The Trial Court Properly Found That There Was A "Proceeding" Within The Meaning of Section 1422.

The defendant's remaining argument on appeal is that her conduct did not fall within the statute under which she was charged. Specifically, the defendant argues that the trial court erred in finding that the evidence established the existence of a "proceeding" within the meaning of Section 1422. In support of this contention she urges a hypertechnical construction of the statute and unfairly paraphrases the testimony of the Government's expert wherein the relevant INS procedures were explained. (Tr. 5-12).

Section 1422 provides in pertinent part:

"Whoever knowingly demands, charges, solicits, collects, or receives . . . any other or additional fees or moneys in proceedings relating to naturalization or citizenship or the registry of aliens beyond the fees and moneys authorized . . ." [violates the law].

The legislative history of this section reveals a broadening of the scope of this criminal prohibition, culminating in the language of the current statute.*

* The earliest version of this statute reads as follows:

"That it shall be unlawful for any clerk of any court or his authorized deputy or assistant exercising jurisdiction in naturalization proceedings, so to demand, charge, collect, or receive any other or additional fees or moneys in naturalization proceedings save the fees or monies

[Footnote continued on following page]

At trial the Government called Frank Johnson, Chief of the Investigations Fraud Unit of the INS, to identify INS forms of the type which the defendant had given Pirani. (GX 1, 2). Johnson identified them as alien employment certification applications. (Tr. 6). He described the completion of those forms as the first step in INS procedures relating to an adjustment-of-status proceedings from non-immigrant to permanent resident status. (Tr. 6-7). See *United States v. Schaier*, 175 F. Supp. 838 (S.D.N.Y. 1959) (where an adjustment-of-status proceeding was held to be within Section 1422).*

The Government contended, and the District Court concluded, that once the INS forms were completed, INS "proceedings" within the meaning of the statute had commenced. Specifically, Judge Metzner's opinion stated as follows:

herein specified." Act of June 29, 1906, ch. 3592, § 21, 34 Stat. 602.

That provision was amended in 1940 to read as follows:

"It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the government of the United States or not—

* * *

"Knowingly to demand, charge, solicit, collect or receive, or agree to charge, solicit, collect or receive any other or additional fees or monies in naturalization or citizenship or other proceedings under this chapter than the fees and monies specified in such chapter." The Nationality Act of 1940, 8 U.S.C. § 746(a) (33) (1940 ed.), 54 Stat. 1167.

The present provision was codified by the Act of June 25, 1948, ch. 645, 62 Stat. 766, revising the criminal code.

* On cross-examination defense counsel obtained an affirmative response to a leading question which asserted that no INS "proceedings" existed until INS received the documents in question. (Tr. 7). However, obviously the question called for a legal opinion and the District Court was not bound by witness' view of the law.

"In my opinion the proceedings relating to registry of Pirani commenced when the defendant obtained the forms and had Mrs. Pirani sign them." (Opinion, June 10, 1977).

In rejecting the defendant's argument that no proceeding existed until INS received the forms, the District Court properly concluded that INS "proceedings" encompassed the obtaining and completion of the agency's official forms.

The defendant urges this Court to adopt a narrow interpretation of the statute and to hold that INS must commence some formal proceeding before the statute's prohibition applies. However, this would run counter to the Congressional intention, as evidenced by the history of the statute, which was broadened to reach acts of non-governmental persons and to encompass "proceedings" beyond the formal judicial proceedings which the earliest version of the statute described.*

The District Court's decision is well supported in the regulatory scheme of the agency. Section 1422 prohibits collecting fees "in proceedings relating to naturalization or citizenship or the registry of aliens beyond the fees and moneys authorized . . ." The regulations of INS in turn provide a schedule for fees, primarily required in connection with applications to INS, such as the one which Pirani signed in this case. 8 C.F.R. § 103.7. In this

* It is interesting to note that in adopting the earlier version of this provision in the Act of 1940, Congress specifically extended this and other criminal prohibitions to frauds committed during any attempts to initiate judicial proceedings. The pertinent provision, § 345(c), reads as follows:

(c) The provisions of this section shall apply to all proceedings had or taken or attempted to be had or taken, before any court specified in subsection (a) of section 301, or any court, in which proceedings for naturalization may have been or may be commenced or attempted to be commenced, and whether or not such court at the time such proceedings were had or taken was vested by law with jurisdiction in naturalization proceedings.

context, it can readily be seen that if moneys in excess of an authorized application fee is collected, the prohibition of § 1422 should apply.

This conclusion is further bolstered by the fact that INS regulations define a "case" as a "proceeding arising under any immigration or naturalization law" and this in turn is defined to include "preliminary steps by any private person . . . preliminary to the filing of the application or petition by which any proceeding under the jurisdiction of the Service . . . is initiated." 8 C.F.R. § 1.1(g). The language of this provision, designed to reach the acts of private persons in preparing INS applications, bespeaks the importance of the early application phase in INS procedures. In a regulatory scheme that primarily involves numerous application processes, INS obviously has a strong interest in the integrity of even the earliest stage of the preparation of applications.

In sum, the statute's broad prohibition against collecting moneys "in proceedings" was properly found by the District Court to include the fraud perpetrated by the defendant, who took it upon herself to obtain official forms from INS and to have Ms. Pirani complete them. The District Court's conclusion to that effect should be upheld.*

* Although it was not the basis for the District Court's opinion, the Court's conclusion is equally supportable on the theory that an INS proceeding relating to registry of aliens commenced when Pirani entered the United States and continued through the time of the fraud committed by the defendant. The registration of aliens was required under the Act of 1940 and continues in present law. 8 U.S.C. § 1302(a). The INS proceeding thus initiated continues while the alien remains in the United States since the alien is required to notify the Attorney General of his current address on a yearly basis. 8 U.S.C. § 1305. The defendant's acts in purportedly attempting to cure Pirani's violation of this provision thus constituted the collection of fees in connection with the ongoing INS proceeding relating to Pirani's registration as an alien.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss. :
COUNTY OF NEW YORK)

PETER NOEL DUHAMEL being duly sworn,
deposes and says that he is employed in the office
of the United States Attorney for the Southern District
of New York.

That on the 3th day of February 19 78, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Joseph A. Milligan, Esq.
1550 Deer Park Avenue
Deer Park, New York

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Sworn to before me this
8th day of February, 1978.

Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-076450 Qualified in Kings Co.
Commission Expires March 30, 1928

PETER NOEL DUHAMEL

